No. 13,130

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, a Corporation; THE ROBERT DOLLAR Co., a Corporation; H. M. LORBER,
Appellees.

Appellees' Supplemental Memorandum

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I.

APPELLANT IS BOUND BY THE DISTRICT OF COLUMBIA JUDGMENT ON PRINCIPLES OF COLLATERAL ESTOPPEL

After this brief was in page proof we found that the current issue of *Harvard Law Review* (March 1952) contains a major article on "Developments in the Law—Res Judicata" (pages 818 to 887). At this last moment it is not possible to quote. But the article fully supports our brief on the subject, and expressly approves the judgment below as correct (p. 856). (This article is in addition to the one in the January issue of the Harvard Law Review referred to in our brief.)*

Appellant relies upon the statement in the Supreme Court's opinion in *Land v. Dollar* (referred to in later decisions and opinions) that in a subsequent suit brought by the United States

*See also Georgetown Law Journal, January 1952, page 289, "At the Crossroads of the Doctrine of Sovereign Immunity: The Dollar Case."

the judgment in the first suit would not be *res judicata.* But that statement by the Supreme Court has no application because it was not made with reference to any later and different set of facts to which the decision and opinion were not directed.

Thus appellant implicitly concedes and certainly will not deny that the Department of Justice could have intervened in *Dollar v. Land* in behalf of the United States *eo nomine* after the Supreme Court's decision, and pleaded the title of the United States and, that if it had done so, a judgment adverse to it would have been binding in any later suit under the doctrine of *res judicata.* That being so, it necessarily follows that no such statement by the Supreme Court in its opinion could have any application to later activities in behalf of the United States which justify application of the principle of collateral estoppel. On an intervention the United States would be bound, not only by what was decided, but by everything that could have been. *A fortiori,* it is bound by facts constituting a collateral estoppel, which has the lesser effect of binding one only by what is decided.

It must follow that (a) an appeal to the doctrine of sovereign immunity is sham, and (b) an appeal to what the Supreme Court said in 1947 is equally unavailing.*

Appellant's discussion contains this remarkable statement (R. Br. 48):

> "The issue of ownership of the shares is still pending before the Supreme Court on **our** petition for reconsideration of denial of certiorari to review Dollar v. Land on the merits."

The petition for certiorari and the petitions for rehearing referred to in this passage were filed in *Dollar v. Land* by the Depart-

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*Appellant's reply brief (p. 49) tries to confuse the difference between res judicata and collateral estoppel by asserting that appellees themselves called the defense res judicata. It would, of course, be irrelevant what appellees' counsel may have called it. However, the assertion is unfounded. Appellant's citations to the record show that, after pleading the facts, our answer characterized the facts in two ways (1) as creating a conclusiveness of the judgment and (b) as creating res judicata. We presented the subject of res judicata in our brief in a footnote (at p. 45) but have not thought it necessary to amplify the point "because the collateral estoppel is clear, and it is sufficient."

ment of Justice nominally on behalf of the defendants Land, et al. But appellant says "our." What more striking confession could be asked that *Dollar v. Land* has been conducted by the Department of Justice for the United States as the real party in interest to assert the title of the United States? Unless counsel rivet their minds by sheer will power on artificialities, they naturally fall into a recognition of the reality.

Appellant apparently makes the statement just quoted to suggest that the judgment in the District of Columbia litigation is not final. It is final. In the federal courts it is settled that even an appeal from a judgment "does not—until and unless reversed—detract from its decisiveness and finality." *Huron Corporation v. Lincoln County,* 312 U.S. 183 at 189. So long as a judgment is unreversed, its integrity, validity and effect are complete as to all those affected, "in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense." *Deposit Bank v. Frankfort,* 191 U.S. 499 at 511; *Reed v. Allen,* 286 U.S. 191.

A petition for certiorari has even less consequence than an appeal. Neither its filing nor the granting of a writ has any effect. *Magnum Import Co. v. Coty,* 262 U.S. 159, 163; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, 1951 ed., at p. 886. Here a petition for certiorari has been denied, a petition for rehearing was then denied, and what is presently pending is merely a second petition for rehearing of denial of certiorari.

II.

NO GENUINE ISSUE OF FACT EXISTS, THE UNDISPUTED AND ADMITTED FACTS ESTABLISH THAT THE 1938 TRANSFERS WERE A PLEDGE, AND THEREFORE A SUMMARY JUDGMENT WAS PROPERLY ENTERED FOR APPELLEES.

1. Re Appellant's Failure to Make Any Showing in Opposition to the Motion for Judgment.

At the oral argument before this Court on March 24, 1952, appellant's counsel gave his reason for tendering in the District Court no showing of new evidence in opposition to the motion

for summary judgment. The reason was that appellant *had no such evidence,* because its "investigation was just beginning at the time the case came before Judge Murphy on summary judgment" (Transcript, p. 23).

This is a remarkable revelation!

When appellant filed this suit on March 12, 1951, it rushed into court for a preliminary injunction to prevent appellees from enforcing their judgment for possession obtained in the District of Columbia courts. In seeking that injunction *appellant represented* to the District Court that it already had new evidence. On March 26, 1951, its counsel, the very counsel who addressed this Court on March 24, 1952, said in open court (R. 70):

> "And furthermore this case will be tried on a new level. Counsel for the Dollars has asserted that all of the facts have been put into evidence in the District of Columbia proceedings. Nothing new could be presented. It would be merely a rehash of the same old thing. That, Your Honor, is not the case. Either party on the trial of this action will be free to adduce such new evidence as it chooses, and *I assert to Your Honor right now the Government has new evidence not presented in the District of Columbia action* which it will present upon the trial of this case."

When the District Court issued its preliminary injunction in April 1951, it was motivated, at least in part, by this representation. Its opinion states (97 F. Supp. 50 at 55): "In addition, they [appellant] claim that additional evidence is to be presented."

On May 31, 1951, the cause was before this Court on motion for stay of the preliminary injunction pending appeal therefrom. At the time the same counsel asserted that the government "will be free to and it *will* make a new record on the merits of the case." (Transcript of proceedings of May 31, 1951, p. 20). It was on the very next day that the motion for summary judgment came on in the District Court.

Yet, as counsel has now assured this Court, at that time appellant knew of no new or material evidence.

Here is a case where the material facts occurred in 1938. The complaint in *Dollar v. Land* was filed in November 1945. It was not until 1948 that the case went to trial. The Court of Appeals for the District of Columbia decided the case on its merits in July 1950. At least as early as December 1950 counsel began to think of filing the present suit (R. 93). Three months more elapsed before it was filed. Another two months elapsed before the motion for summary judgment was heard. Four more elapsed before it was decided.

Yet now we are told that appellant had only begun to look for new evidence at the time the motion for judgment was heard.

This confession that no new relevant evidence was available when the motion for judgment was presented completely confirms our assertion that none exists, because every shred of evidence had been sifted in the preparation for the first trial.

And in what "secluded" nooks was the "new" evidence hidden which appellant now goes outside of the record to assert that it has? The material referred to in its Opening Brief (pp. 49-52) was in the newspaper files it ransacked for the first trial, in the probate file it examined and photostated for the first trial, in the files of the Bureau of Internal Revenue it explored for the first trial, in reports of the Commission with which the record in the first trial is replete.

If appellant were seeking a new trial on the ground of newly discovered evidence, it would be laughed out of court for lack of diligence and for lack of materiality of the trivia it proffers. *United States v. Pacific Fruit & Produce Co.,* 138 F.2d 367, 371 (9 Cir.); *United States v. Bransen,* 142 F.2d 232, 235 (9 Cir.); *Lanham v. Cline,* 132 F.2d 320 (3 Cir.); *Pasotex Pipe Line Co. v. Murray,* 168 F.2d 661, 663 (5 Cir.). A new trial on this trivia "would merely have resulted in giving [it] another day in court." *Mutual Life Ins. Co. v. Parkinson,* 72 F.2d 759, 761 (3 Cir.).

Moreover, it is completely irrelevant that appellant did not have any "new evidence" available at the time of the motion for summary judgment. Rule 56(f) R.C.P. provides the procedure

for a litigant who can obtain evidence if given time but does not yet have it. Under it appellant could have applied to the court below, on a proper showing by affidavit, for (1) an extension of time in which to make a showing or even (2) for an order refusing the application for judgment.

Appellant made no such application, let alone a showing to support it. Had it made such an application the facts would not even have warranted its being granted. *Hartman v. Time, Inc.*, 64 F. Supp. 671, 677; *Shultz v. Manufacturer's & Traders Trust Co.*, 30 F. Supp. 443.

After all, appellant was not a defendant, haled into court and rushed to a hearing. It was the plaintiff. It had filed the suit at a time chosen by itself and grievously tied up appellees with a preliminary injunction.

But we need not consider what disposition would have been proper of an application under Rule 56(f), if one had been made. None was. It would be the height of incongruity if an appellant could obtain a reversal upon a bare assertion to the appellate court that it was not ready in the court below.

It was asserted at the oral argument that this is not a proper sort of case for a summary judgment because, forsooth, eventually some new shred of evidence might be uncovered. If a private litigant were to make such a representation to a court, we submit the assertion would receive not a moment's consideration. The fact that the government is the appellant should make no difference.

If the government can demand postponement of a motion for summary judgment while it searches for new evidence, it could equally postpone a trial for the same reason.

We submit that appellant's contention is not only unsound, it is disgraceful.

The truth is apparent:—Appellant never has intended to do anything and never has done anything with respect to the motion for summary judgment except to insist that, unlike a private litigant, it has an absolute right to a trial *de novo*, just for the asking.

2. Re Appellant's Failure to Point to Any Error in the Decision of the Court of Appeals for the District of Columbia.

Another truth is apparent from appellant's briefs and oral argument: It does not point to any error in the decision of the Court of Appeals for the District of Columbia; it simply insists that the District Court should have disregarded that Court's decision, just as if it never existed.

Beyond this, appellant merely charges the District of Columbia Court of Appeals with "ignoring the * * * fact that the stock was transferred to the Commission as consideration for the release of R. Stanley Dollar and Dollar Steamship Line from their liabilities to the Government as sureties on the ship debts." (R. Br. 54).

Of course, that court ignored nothing. Transfer of the property in consideration of a release of a surety liability does not mean a sale. It means a substitution of collateral. As the Court of Appeals succinctly said (*Dollar v. Land,* 184 F.2d 245 at 256):

> "In ordinary commercial transactions full consideration for release from a suretyship is paid by the surety in either of two ways, (1) satisfaction of part of the debt or (2) other collateral acceptable to the creditor is supplied. * * * Where the debt continues intact and the creditor releases a surety upon deposit of a paper security, the creditor does not by that transaction alone become absolute owner of the security thus deposited. He holds it as pledgee."

Appellant asserts (R. Br. 55) that a creditor can take ownership of property in exchange for releasing a surety while leaving the principal liable on the debt. Assuming that such a transaction is legally *possible,* the observation is irrelevant, and for *three* distinct reasons:

First, equity frowns on such a transaction. If a particular agreement is unequivocally of the nature described, a different question may be presented. If the agreement is not unequivocally such, it will not be so construed. In the District of Columbia litigation the burden of proof was upon the Dollars. Yet the Court held that equity and the record compelled a construction

contrary to what appellant claims. Here the burden of proof is upon appellant, and the record is the same. Appellant points to nothing but the face of the written agreement. Yet the Supreme Court held that the face of the agreement does not lead to appellant's conclusion. The agreement was before the Supreme Court in *Land v. Dollar,* 330 U.S. 731, and the Department of Justice there unsuccessfully argued that the transaction was necessarily a sale.

Second, Appellant's assertion confuses two different questions: (a) whether a discharge of a surety will completely discharge the principal, and (b) whether the value of what is paid by the surety for his discharge must at least be applied to reduce the debt of the other. The leading cases, while holding that there is no discharge *in toto,* also hold that the debt is reduced *pro tanto. New Orleans v. Gaines,* 138 U.S. 595, 601, 602, 615, 616; and see 131 U.S. at 220. And *Barnett v. Conklin,* 268 Fed. 177 (8 Cir.).*

In the *Gaines* case, the City of New Orleans had purchased land and sold portions to many others. Gaines claimed that she or her ancestors and not the city's vendor was the owner and prevailed in her claim. She sued the city's vendees for rents and profits accruing while they were in possession and recovered judgments totalling $576,707.92. She then sued the city for this amount. Upon the basis of a rule of the civil law derived from the Code Napoleon which prevails in Louisiana, the court held that the city was the principal and its vendees sureties, and that Gaines could therefore hold the city liable (see 138 U.S. at 600, quoting from previous decision in 131 U.S. at 191, and see 131 U.S. at pp. 210, 213). But the court held that if any of the judgments had been compromised for less, the city was entitled to the benefit of the reduction (138 U.S. at 601, 131 U.S. at 220). On retrial it was shown that Gaines had released some of the vendees for amounts totaling $15,394.50 (138 U.S. at 602), but reserved her rights against the city. The city claimed that the

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*Appellant cited these cases in its District of Columbia briefs but omits them now.

releases discharged it in full; Gaines claimed that no credit should be given the city at all. The trial court rejected both claims and gave judgment for $561,313.42, thus deducting the $15,394.50 (138 U.S. at 605). Both sides appealed, and the Supreme Court rejected both appeals and affirmed (pp. 615, 616).

In appellant's first citation, *In Re Kimbrough-Veasey Co.*, 292 Fed. 757 (N.D. Ga.), the court held that while a mere agreement not to sue one co-debtor does not discharge the others, nevertheless "by the weight of authority, however, since the creditor is entitled to but one satisfaction, no matter how many persons may be bound to render it to him, any payment so made must be credited as against the other co-obligors" (p. 758).

In California, the Civil Code recognizes the distinction. A release of one co-debtor does not discharge the other (Section 1543) but it does diminish his obligation by the amount of what is paid (Sections 1474 and 1477. Also California Annotations to Restatement of Contracts, Sec. 120).

Third, appellant ignores the relationship of the parties here. Mr. Dollar and Dollar of California were not merely sureties for Dollar of Delaware. All three were "jointly and severally liable" on the debt (See Our Brief, p. 81; J.A. 310-319, particularly 312 and 317). As respects each other they were sureties, but as respects the creditor, the United States, the situation was that Dollar of California and Mr. Dollar were jointly and severally principals with Dollar of Delaware.*

*The facts, it will be recalled, were that Mr. Dollar and Dollar of California were originally the debtors to the United States, the makers of the notes and the ship mortgagors. Later they transferred their interest in the ships to Dollar of Delaware. This required the Shipping Board's consent, which was given only upon agreements that Dollar of Delaware become liable on the notes and that Mr. Dollar and Dollar of California remain liable as makers and mortgagors. The agreements specified that all three were "jointly and severally" liable to the United States. It is an elementary principle of law that on a sale of mortgaged property by the mortgagor wherein the purchaser agrees to assume the debt, as between themselves the purchaser becomes in law the principal debtor and the mortgagor occupies the relation of surety. But as regards the creditor, the original mortgagor remains bound as a principal. *Braun v. Crew,* 183 Cal. 728, 192 Pac. 531; *Bank of America v. Dennison,* 8 C.A.2d 173, 47 P.2d 296.

The *Restatement of the Law of Contracts,* Section 120, sums up the law on the subject: If one of two or more obligors pays in whole or in part, in the manner provided in his contract, the payment redounds to the credit of all the other obligors, whether the liability is joint, joint and several, or merely several; *and no agreement to the contrary will be given effect.* If, instead of performing in the manner provided in the contract, one obligor either fully or partially satisfies the obligation (as by transferring property in whole or partial satisfaction of an obligation to pay money) again the right of the creditor to proceed against the other obligors is reduced by the value of what was transferred, and if the obligation is joint, or joint and several, *no agreement to the contrary is effective.* Such an agreement may be regarded if the liability was merely several, but even then the law will avoid the result if in any way possible. See, particularly, Comment c on subsection (2) (referring to the idea of unity in a joint duty) and to the Comment on subsection (3).

2 *Williston on Contracts* (Rev. Ed. 1936, Sec. 341, pp. 1008-1011) discusses the subjects and supports the view of a *pro tanto* discharge of all joint or joint and several debtors even though there be an express agreement to the contrary. He adds (p. 1011):

> "Payments so made are now applied in reduction of the debt and in discharge of the other promisors or obligors by statute in a number of jurisdictions,"

citing Section 1474 of the California Civil Code and Section 3 of the Uniform Joint Obligations Act. This rule that, if one joint debtor is released on a transfer of ownership of property, its value must be applied to reduce the debt of the other applies to debts due the United States. *United States v. Thompson,* Fed. Cas. No. 16,487 (E.D. Penn., 1836).

In short, there may be several situations in which a surety relationship arises. Those occupying the relationship between themselves may be jointly and severally obligated as to the creditor

or they may be only severally obligated.* As said in the Restatement of the Law of Security, Section 82, page 230:

> "So far as the creditor is concerned, the surety may be the primary obligor. Where principal and surety are bound jointly, from the standpoint of the creditor there is no secondary liability."

And, again (232):

> "Suretyship obligations are contractual, and the important point of inquiry should be the precise undertaking of the surety and the duty of the principal. The recognition of the existence of different forms of contractual suretyship and the emphasis upon the obligation assumed in a particular case, are of greater significance than the distribution of labels to the various types of contracts."

As the Restatement further notes (p. 233): "None of these situations belongs solely to the field of suretyship," and they are included in that category only because such of the rules as arise from the surety relationship would apply to all. But the surety aspect cannot displace other rules arising from other aspects of the situation.

The authorities that lay down the rule covering cases of joint and several liability make no exception in case of suretyship. In 2 *Williston on Contracts,* Sec. 333, pp. 968-69 (Rev. Ed. 1936) it is said that the rule relating to release of one joint debtor does not depend on the law of suretyship, and that the cases disclose "no inquiry or consideration of possible suretyship relations which the joint debtor released may have borne to his co-debtors."

Even *if* it were legally possible for a co-debtor (or surety) to buy his release without necessarily reducing the debt of the others, the fact that the debt is not reduced is compelling proof of a

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*A surety may be liable by himself, on a different obligation from that of the principal (e.g., to pay if the principal does not or to pay damages for the principal's default on some other obligation than one for the payment of money (see Restatement, Sec. 82, Comment f, p. 230)), or he may be jointly or jointly and severally liable with the principal on the same obligation, as here.

security transaction. Here the debtors were jointly and severally liable, and not merely severally so. Yet even in the case of debtors merely severally liable, where it is legally *possible* for one to buy his release without affecting the liability of the other, the law regards the result as so inequitable and unjust that it will avoid it if in any way possible. Referring to this situation, *Restatement on Contracts,* Sec. 120, comment on subsection (3) states:

> "Though this is legally possible, an inference should not be drawn that the duty of one promisor only is to be affected, unless circumstances clearly require that conclusion" (p. 140).

The same spirit of antipathy to an unjust result compels the construction of the transaction as one where the property was not transferred outright but was merely substituted as security in place of the co-debtors' personal liability.*

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*It is interesting to note what was actually involved in the handful of cases diligently exhumed by appellant from musty volumes.

Peer v. Kean, 14 Mich. 354 (1866) involved the liability of the maker of a note (the principal) upon discharge of an endorser, whose liability was several, not joint. *Mechanic's Bank v. Rathbone,* 26 Vt. 19 (1852) involved the liability of the acceptor of a draft (the principal) upon the release of the drawer, whose liability was merely secondary and several. *Bridges v. Phillips,* 17 Tex. 128 (1856) involved sureties on a note, and the question as to whether release of the surety discharged the principal entirely, not whether credit should be given. *In Re Kimbrough-Veasey Co.,* 292 Fed. 757 (N.D. Ga.) the relationship was not that of joint debtors but was the conventional one of principal and surety in its very inception. The court, sitting in Georgia, applied Georgia law, relying on *Gilstrap v. Smith,* 101 Ga. 120, 28 S.E. 608, another of appellant's citations, which was based on Georgia Civil Code (1895), Sec. 2970 (now Georgia Code of 1933, Sections 103-201).

Pingrey on Suretyship and Guaranty (published 1901) and *Brandt on the Law of Suretyship and Guaranty* (published 1905) deal with the conventional suretyship, and the cases cited by these two texts support us.

III.

ON LACK OF AUTHORITY IN THE COMMISSION

A. Re the Contention That Appellant Is Entitled to Prevail Even Though the Commission Lacked Power to Acquire Absolute Title.

Appellant tries to avoid confronting the issue of the Commission's power to take ownership by arguing that appellant may prevail even though the Commission lacked that power. This argument is not only unsound on the merits but it has been foreclosed by the Supreme Court.

1. THE CONTENTION HAS BEEN FORECLOSED BY THE SUPREME COURT.

The argument is in the teeth of the Supreme Court's decision on this very matter, as well as the decision of the Court of Appeals for the District of Columbia Circuit. Both of those courts explicitly held that appellees are entitled to the stock in *either* of two events: (a) If the Commission had no power to acquire absolute title; or (b) if, properly construed, the contract was a pledge. And in either event, the Supreme Court said, the "dominant interest of the sovereign is then on the side of the victim," i.e., the present appellees (330 U.S. 731, 738).

The Supreme Court held in *Land v. Dollar,* 330 U.S. 731, 735:

> "The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondent's property under the claim that it belongs to the United States. That conclusion would follow if either of respondent's contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares."

And again at page 739:

> "* * * if it is decided on the merits either that the contract was illegal or that respondents are pledgors, they [plaintiffs] are entitled to possession of the shares as against [defendants] * * *."

The Court of Appeals said in *Dollar v. Land,* 154 F.2d 307:

> "Appellants contend that the 1938 contract represented nothing more than a pledge of the stock. This position is founded on two arguments: (1) the Commission was without authority to acquire absolute and unqualified title to the securities, and (2) the terms of the contract, and the circumstances under which it was entered into, require the court to interpret it as a security transaction. The debt originally owing the Commission has now been paid. Hence, if appellants' contention be correct the United States now has no interest in the collateral. * * * (p. 309)
>
> "* * * if * * * the defendants acted without authority in the first instance, or have by subsequent conduct overreached their statutory authority, their position becomes the same as that of the officials of the Lee case. (fn. 6, p. 310)

In its opinion of April 11, 1951, *Land v. Dollar,* 190 F.2d 366, the Court of Appeals said (p. 367):

> "This is the fourth time this case has been before us. It has been before the Supreme Court three times. The first time, that Court, without dissent, rendered an opinion which has been the guide for every subsequent action of this court."

The opinion then quotes the foregoing passage from the Supreme Court's opinion.

Appellant asserts that the question whether appellees may assert the Commission's lack of authority has not been passed on in the District of Columbia litigation! This is an incomprehensible assertion. On the contrary, the issue was *necessarily implicit* in the jurisdictional issue and was necessarily decided.

The gist of the contention is that, despite lack of power to take ownership, ownership passed because the transaction was "executed" or because lack of power can be asserted only by the United States, and the like. But none of these arguments depend on any affirmative showing by appellant or by defendants in *Dollar v. Land.* They constitute a response of "so what" to the charge that the Commission lacked power—a demurrer. Were that demurrer sound, the decision of the Supreme Court would have been erroneous.

Moreover, the contention was *explicitly* made by the Department of Justice in the District of Columbia litigation and was argued in the briefs.* Indeed appellant's entire argument on the subject has been scissored out of its brief on the appeal culminating in *Dollar v. Land,* 184 F.2d 245. Part III of that brief (pp. 93-94) was entitled "Appellants are not entitled to recover the stock even if the Commission lacked authority to acquire absolute title."

The issue was presented and necessarily decided by the Supreme Court, not only because the jurisdictional issue rested upon it, but independently. The court reversed a dismissal of the complaint. The dismissal would have had to be affirmed if sustainable upon any ground whatever. In seeking an affirmance, the Department of Justice invoked that rule and argued, not only that the suit was one against the United States, but that the complaint stated no cause of action.

Consequently, the argument appellant makes is foreclosed.

2. THERE IS EVEN LESS SUBSTANCE FOR THE CONTENTION NOW THAN IN THE DISTRICT OF COLUMBIA.

Since the contention had no substance in the District of Columbia, it has less substance here.

There the Dollars were the plaintiffs, seeking recovery. Here the Attorney General, speaking as the United States, is the plaintiff, seeking affirmative relief to quiet a title. A plaintiff is under the burden of establishing its title, and that it can not do on the basis of a transaction having no authority in the statutes.

3. THE ARGUMENT IS UNSOUND ON ITS MERITS.

Acquisitions of property by government agents without authority of statute are not merely unauthorized, they are prohibited (see our brief, p. 100). The problem is not one of application

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*E.g., the Department's brief in the Court of Appeals on the first appeal in 1946 (at pp. 45 and 46), our brief at p. 25, and our brief in the Supreme Court, pp. 26 and 27. Also briefs in the trial court in 1948; Department's brief, pp. 17, 33-39.

of the rules of principal and agent existing between private individuals, or of *ultra vires* in the field of private corporations, but of Congressional grant of power to a government agency. "The law applicable to the authority of a Government employee is quite different to the law applicable to an agent or employee of a private individual or company." *Bayboro Marine Ways Co. v. United States,* 72 F. Supp. 728, 730.

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power and adequate Congressional authorization to the contracting officers, warranted by the Constitution and regular under statute. *United States v. Allegheny County,* 322 U.S. 174, 182. Lack of validity or lack of power cannot be waived. *Parkersburg v. Brown,* 106 U.S. 487, 501. Lack of power results in nullity. Nullity passes no ownership. If the transaction when it occurred did not transfer ownership, government officials cannot set up ownership in the government, and the owner is entitled to recover. This is precisely what was held in *United States v. Lee,* 106 U.S. 196, 199.

In *United States v. Tichenor,* 12 Fed. 415, the United States claimed that defendants had quitclaimed certain land to it. The court said (p. 421):

> "Neither did these conveyances * * * have the effect to vest any interest in the premises in the plaintiff. * * * there was no authority upon the part of the grantee to purchase, and therefore they were as conveyances void and inoperative. * * * It is not claimed that there was any law authorizing any one to purchase this property, and without such authority, the purchase was void."

In *City of Floydada v. American La France & Foamite Industries,* 87 F.2d 820 (5 Cir.), appellee sold and delivered a fire truck to the City of Floydada, which was without the power to purchase it under the state constitution. The sale was therefore held to be void. "The title to the fire truck never passed to the City, but remained in the would-be vendor." (p. 821).

In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, the court said (p. 689):

> "* * * where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief."

Appellant (R. Br. 4) cites cases to the proposition that "limitations on the authority of a Government agency are for the benefit of the Government, not for the benefit of those, such as the Dollars, who voluntarily contract with the agency." The cited cases do not relate to acts done beyond any granted power but to the irregular exercise of unquestioned power and particularly to authorized acts performed merely without compliance with particular conditions or formalities construed as being for the protection of the government, such as public advertisements before the purchase of supplies or reduction of an authorized contract into a particular written form.*

Moreover, it is sheer question begging to assert that the transaction has been "executed" as an outright transfer of ownership. Since no power was ever conferred on the Commission to acquire the stock in private corporations *except as security,* any contract having the purpose or effect of transferring title would be ineffective, void and incapable of conferring or divesting rights, *to the extent* of a transfer by way of purchase, but it would be effective

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*While the rules regarding the powers of government agents are far stricter than those respecting corporate powers, note *Louisville etc. Ry. Co. v. Louisville Trust Co.,* 174 U.S. 552 at 570:

> "The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

Accord: *Fairbanks, Morse & Co. v. Highland Glades Drainage Dist.,* 43 F.2d 867.

to transfer title to the extent legally permissible. A pledge is also a transfer of title (Our Brief, p. 84, fn. 1), and a contract purporting to transfer title to any extent would serve to transfer it to the extent permitted, i.e., as security. The law in effect at the time an agreement is executed enters into and is a part of the contract. *Northern Pacific Ry. v. Wall,* 241 U.S. 87; *Von Hoffman v. City of Quincy,* 71 U.S. 535; *City of Floydada v. American La France & Foamite Industries,* 87 F.2d 820 (5 Cir.). In the case last cited, a purchase being beyond the City's power, a transfer of possession was treated as a contract for hire. In *Smoot v. United States,* 38 Ct. Cl. 418, a lease for a term of years to the United States where the government agent was authorized to lease for a lesser period was held valid as a lease for the permissible term.

In *Dollar v. Land,* 154 F.2d 307 the Court of Appeals for the District of Columbia held that if the Maritime Commission lacked statutory power to acquire ownership, all that it got was a pledge.

Moreover, in order to assert that a *sale* was executed, what was done—the acts of consummation as distinguished from the preceding agreement—must be compatible *only* with a sale. If equally consistent with a transaction of another character, it cannot be said that what was executed was a sale.

Here appellees neither gave nor received anything not equally consistent with a pledge. What they did—subsequent to the agreement—was to endorse and deliver stock. *This* was their *execution,* but it is thoroughly consistent with a pledge.

The same is true from the standpoint of what they received. Mr. Dollar and Dollar of California received a paper purporting to be a release. But the paper was nothing unless capable of being given effect as a discharge. A government official has no authority to release rights of the government without specific grant of power, and the government is not bound by his action in purporting to do so; such a release is void and unenforceable. *American Sales Corp. v. United States,* 32 F.2d 141 (5 Cir.); *Bayboro Marine Ways Co. v. United States,* 72 F. Supp. 728.

The releases here would be valid only as part of a substitution of collateral authorized under the 1938 amendment to Section 207 of the Merchant Marine Act. Since the Commission had no power to enter into the transaction as a purchase and sale, the releases as consideration for a purchase would be a nullity.

Still again, the stock was not transferred to the name of the "United States" but to the "United States Maritime Commission." If the Commission acted beyond its powers, then no transfer to the United States ever occurred, i.e., there was no execution as a sale. As said in *The Underwriter,* 6 F.2d 937, 939, 940 (aff. *Maul v. United States,* 274 U.S. 501):

> "* * * But an agent of the government is such only within the prescribed limits of his commission, and his commission cannot exceed the boundaries of the legislative grant which authorized its issuance to him. When, therefore, an agent of the government acts in excess of the authority vested in him, his act from a legal standpoint is no longer the act of the government."

Appellant bases an argument on the subject of executed *ultra vires* contracts of private corporations. Not only is that subject foreign to the matter of powers of government officials, but the basis of the decisions cited* is the principle that no party in *pari delicto* may obtain relief from an executed illegal contract. And the *pari delicto* rule has no application to a case such as the present. The invalidity of taking outright title arose, not from any violation by appellees of public policy or from any engagement by them in fraudulent transactions, but from lack of statutory power in the Commission. No moral blame attaches to them. They were not in *pari delicto.* This very point was made by Chief Justice Taft, when he was a circuit judge, in *City of Detroit v. Detroit City Ry. Co.,* 60 Fed. 161 at 163, 164, holding the *St. Louis* case inapplicable. We call particular attention to pages 163 and 164 of that opinion.

**Harriman v. Nothern Securities Co.,* 197 U.S. 244, at 295, 296, and *St. Louis etc. Railroad v. Terre Haute etc. Railroad Company,* 145 U.S. 393, at 406-408.

And in *Parkersburg v. Brown,* 106 U.S. 487, 503, the court said:

> "'* * * There was no illegality in the mere putting of the property by the O'Briens [the mortgagors] in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum,* and *where the city was the principal offender* * * *.'"

And see *Central Transp. Co. v. Pullman's Car Co.,* 139 U.S. 24 at 59 and 60. Also *Marsh v. Fulton County,* 77 U.S. 676, 684; *Citizens National Bank v. Appleton,* 216 U.S. 196, 205.

The victim of a transaction or an acquiescent party to the improper act of the other party is not considered to be in *pari delicto.* 12 *Am. Jur.* 734, 735*

Sometimes the principle of appellant's *ultra vires* cases is rested on estoppel. But in *Central Transp. Co. v. Pullman's Palace Car Co.,* supra, the court said (pp. 59, 60):

> "A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say * * * beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. * * * No performance on either side can give the unlawful contract any validity * * *.

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*Cf. *Kentucky Natural Gas Corp. v. Indiana, etc. Corp.,* 118 F.2d 831, 834 (7 Cir.); *Hartford-Empire Co. v. Glenshaw Glass Co.,* 47 F. Supp. 711.

As said in *First Federal Savings & Loan Assn. v. Ansell,* 68 Oh. App. 369, 41 N.E.2d 420, at 423:

> "It is known that situations arise from which agreements ensue, where one party sits in the driver's seat, and the other by force of necessity must, to attain an authorized goal, comply with the request of the first party or abandon his opportunity. In such cases the end sought to be attained is a legal one, but in order to reach that station, he is by a mild but effective compulsion required to participate in an act, which by force of public policy is declared to be illegal. In such a case it is obvious that the parties do not contract on equal terms. Desperate necessity motivates the compliance of the one, while power and greed may dominate the other. Can it be said in such situations that each are in equal fault? Our answer is no."

And cf. *Morrison v. Landers,* 56 C.A.2d 607, 133 Pac.2d 34.

> "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites * * * to its action because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."*

Patently, there is no basis for an estoppel. Appellant says that it lent money and gave a subsidy to the steamship line. But it has been repaid all loans. And the Commission's power to grant subsidies was to be exercised in the national interest of promoting an American merchant marine. The factors upon which a decision to grant a subsidy is to be made are stated in 46 *U.S.C.*, Sec. 1171(a) and have no connection with acquisition of ownership. If the subsidy has served the statutory purpose of promoting the merchant marine, the United States has been the gainer, and if that purpose has not been served, ownership or lack of it has no bearing on the result.†

The argument made in appellant's reply brief at pages 2-3 is precisely the kind demolished in *Land v. Dollar,* 190 F.2d 366 at 375-6.

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*To the same effect: *Granzow v. Village of Lyons,* 89 F.2d 83, 85 (7 Cir.); *City of Arcata v. Green,* 156 Cal. 759, 106 Pac. 86; *School Dist. No. 8 v. Twin Falls Mut. Fire Ins. Co.,* 30 Ida. 400, 164 Pac. 1174; *Pearson v. Duncan & Son,* 198 Ala. 25, 73 So. 406.

And in *Peoples Bank v. Eccles,* 161 F.2d 636, 82 App. D.C. 126, the Court has said that no rule of estoppel applies "where the litigant charges that the administrative body has exceeded the authority conferred on it by statute but does not attack the validity of the statute" (p. 644).

†Appellant asserts that the subsidy came to $20,000,000. This is simply untrue. A five year subsidy contract was given. No subsidies were ever paid on some ships; subsidies were terminated on all by March 1942 (J.A. 1403). By virtue of a recapture clause, very little paid was retainable (J.A. 2057). Subsidies given after this litigation started in 1945 are not conceivably relevant.

B. Re the Contention That Authority of the Commission Has Been Ratified by Congress.

Appellant spends 14 pages (pp. 34-48) quoting self-serving statements made by the Commission to Congressional committees or individual congressmen. In the appendix it even has a 21-page collection of alleged correspondence with individual Congressmen.*

Passing by the fact that many of these statements suggest no more than acquisition of control† and that many were made after

*We are not told by what right government counsel lay such correspondence before the Court. They are no part of the record and could never have been made part of it. A court could not even take cognizance of them in interpreting legislation.

†The 1938 annual report of the Commission to Congress was the first formal announcement of the transactions involved in this controversy. It was made pursuant to the duty of the Commission under the Merchant Marine Act (46 U.S.C., Sec. 1118) to make a report to Congress of its activities at the beginning of each regular session. Far from supporting appellant, it does the reverse. At pages 30-32 there is a section entitled "Government Owned Lines." Here the Commission discusses government-owned steamship properties, but it does not refer to Dollar of Delaware either under that name or the name of American President Lines. That omission contrasts with the fact that on page 10 there is a special section devoted to the transaction in controversy under the heading "American President Lines, Ltd. (formerly Dollar Steamship Lines Inc., Ltd.)." In this section it is not reported that the United States or the Commission had obtained "title" or "ownership" to stock but merely that the "Commission acquired about 90 per cent of the outstanding common stock of the Dollar Line * * *" and that "This Adjustment Plan was consummated in October 1938 and the Commission as majority stockholder obtained complete control in the selection of the management." *Thus the emphasis was upon the fact that the Commission had obtained control of management,* a demonstration that this was its dominant motive and purpose and confirmation of the fact that the transfers were a security transaction. In *Dollar v. Land,* 154 F.2d 307, 310, a similar emphasis in a press release of the Commission is referred to as tending "to illustrate the genuineness of the claim which appellants [the Dollars] are asserting," and to confirm the claim that the 1938 transaction was nothing more than a bargain *"by which there was a substitution of collateral resulting in strengthening the Commission's position by reason of the management control inextricably bound to the transferred stock."*

Appellant next refers to the Special Report to Congress of April 10, 1939. This was designed as a paean of self-praise. If the transaction had consisted of a transfer of ownership to the United States, it concededly would have been an *extraordinary* one (cf. p. 108 of that report). It

the litigation began in 1945, they are pointless. It is fantastic to argue that a government agency creates its own power by not concealing from Congress its unauthorized conduct.

Appellant does *not* assert that Congress ever passed *any* Act ratifying the Commission's claim of power, expressly or impliedly. Power cannot arise from silence of Congress. An Act of Congress may give validity to an agency regulation so as to make it thereafter enforceable. But (1) there must be an Act, an affirmative action by Congress, as the legislative branch (not talk of individual Congressmen), and (2) the Act "must plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo,* 323 U.S. 283, 303. And Congress could not retroactively destroy a right of a citizen to recover property. *Forbes Boat Line v. Board of Commissioners,* 258 U.S. 338.

Here Congress has done nothing. Authority cannot be derived from nothing, much less retroactively.

C. Reply to Appellant's Discussion of the Commission's Power.

In this section, we shall not discuss arguments that we anticipated in our brief.

By failure to deny, appellant admits (1) that it is incumbent on it to point to statutory power; (2) that the power and authority must be clear; (3) that what is not granted is prohibited; (4) that there was no express grant of the alleged power to the Commission; (5) that unless it can be spelled out of Section 207 of the Merchant Marine Act, it does not exist; (6) that no government agency can claim a power by implication

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would therefore be supposed that the Commission would openly inform Congress that the United States had become owner and not bury the fact in a mass of verbiage and documents. *It did not do so.* On page vii appears the letter of transmittal addressed "To the Congress of the United States" and signed by Admiral Land as Chairman. Nowhere in this transmittal is there any reference to "title" or passing of "ownership," only to the granting of a subsidy and the making of loans. The emphasis is upon the *"financial stake"* of the government in the company, all of which denoted a security transaction.

Appellant quotes from documents quoted in the body of this ponderous tome, but they were internal documents, pure and simple.

unless it is *necessarily* inferred from the statute in a way so clearly expressed as to amount to an express power.

It seeks to imply the power in four ways.

1. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP OF THE STOCK CAN BE IMPLIED FROM THE POWER TO PROTECT, PRESERVE OR IMPROVE COLLATERAL (R. Br. 7-10).

Reason simply will not sustain an assertion that the power conferred by the 1938 amendment to Section 207 to "protect, preserve or improve the collateral held by the Commission to secure indebtedness", here the mortgaged ships, gave the power to take outright title to the stock.

The Court of Appeals in *Dollar v. Land,* 184 F.2d 245 at 256, succinctly destroyed appellant's argument:

> "While it is perfectly true that the Commission could, and should, make all proper and desirable requirements for the protection of Government loans, *its power stops at the line which separates the lender from the acquisitor.* It could validly come into ownership of stock in the course of foreclosing collateral in the collection of a debt, but it could not acquire outright ownership in the guise of lending money and creating a debt."*

The stock would carry control of the management, and control by the Commission would secure the debt, but *security remains security, it remains attached to the debt, and when the debt is paid its function has been served.* So far as management or financial position of the company were concerned, the only difference between acquisition of the stock ownership and acquisition of the stock as collateral is that in the former case the Commission could acquire a windfall despite payment of the debt. And this difference is one having no relation to any legitimate objective of the Commission and no relation whatever to protecting, preserving or improving collateral. The power to take outright ownership cannot be inferred from the power to preserve, protect or improve collateral at all, much less "necessarily" so.

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*For the rest of the quotation, see our brief, p. 99.

More than once appellant asserts that the Maritime Commission sought to acquire title in order to prevent the owners of the stock from sharing in possible improved common stock equities, and that such was its purpose and object (e.g., R. Br. 8, 9, 15). Indeed, this seems to be the basis on which appellant predicates the alleged power to take ownership. It is a confession that utterly destroys the claim of authority. It is a confession that the Commission simply decided to exercise its control over subsidies and the like to deprive stockholders of their equity for reasons having no relation to the functions and purposes for which the Commission was created. Congress did not confer on the Commission the power to determine the point at which risk capital should be confiscated or to decide that owners should be denied the right to profit in the event of success of their company.*

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*The spuriousness of the alleged basis of power to take over ownership appears if we refer to a report entitled "Economic Survey of the American Merchant Marine" (J.A. 706, 1420). This was submitted to Congress by the Commission January 3, 1938 pursuant to the command of Sections 210 and 212 of the Merchant Marine Act of 1936 (46 U.S.C. Secs. 1120 and 1122). The Commission reported, under the heading, "Shipping as an Investment," that one of the weaknesses of the American merchant marine, which seemed unlikely to be remedied in the near future, was the hesitancy of private capital. Some of the deterrents to investment were fear of strikes (J.A. 1420)

> "the lack of confidence in a stable Government subsidy policy and the fear that at some future time subsidy contracts may be canceled, leaving the operators without adequate redress; * * * The investment of private capital is also discouraged by provisions of the Merchant Marine Act of 1936 * * *.
>
> "* * * the principal obstacle to capital financing is the political vulnerability of subsidized profits. * * * The moment a subsidized ship line creates substantial cash reserves and, perhaps, begins to pay dividends, there arises a demand for a reduction in the amount of aid. The general public does not know that the cyclical nature of the shipping industry requires large cash reserves; * * * The investor cannot be blamed for hesitating to put his money into an industry which, if profitable, is constantly subject to public and congressional condemnation on the grounds of excessive subsidy."

Every one of the factors referred to applied with particular vigor to Dollar of Delaware, many of them the handiwork of the Commission itself. Despite these discouragements, the stockholders and creditors did put up $4,000,000, but this amount was consumed in the losses incurred

To predicate power on a purpose to expropriate the equity holders is a complete answer to the contention that the Commission was preserving, protecting, or improving collateral.

Appellant asserts that the transfer of stock of a corporation as consideration for a loan is familiar procedure. But its citations do not justify a contention that it is normal or customary for shareholders of a corporation to give up their stock to a lender of funds to the corporations whereby it not only becomes the creditor but the owner of the debtor as well.*

Appellant also goes far afield in citing cases involving the rule in judicial reorganizations that common stockholders may not retain an interest if the creditors or senior security holders accept less than what is fully due them. But, here, the stockholders, by retaining ownership of their stock, did not come ahead of the Commission in any degree, since their stock was pledged to it.

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in the 13 months elapsing from cancellation of the mail contracts as of June 1937 until the agreement of August 1938, as a result of operating the line without any aid such as Congress had provided for in the Merchant Marine Act.

If the failure of old stockholders to put up still further money furnished reason and authority to confiscate their equity in the company, then the Merchant Marine Act authorized the Commission to seize ownership of the entire American Merchant Marine, for new capital was wary of the industry in 1937 and 1938. It is of such flimsy stuff that appellant's arguments are manufactured.

*In *French v. Shoemaker,* 14 Wall. 314, there was a dispute over the ownership of certain properties. In settlement the parties agreed to a transfer to a new corporation and the issuance to the disputants of its stock in certain proportions, and French agreed, for a loan to himself, to transfer his new stock to another party. But the transfer was not outright; *it was merely as security.* The plaintiff (the transferor) offered to reconvey on repayment of the money (14 Wall. 320), and the prayer of the complaint was that the court order foreclosure and sell the security to pay the loan (320, 321).

Handley v. Stutz, 139 U.S. 417, merely involved the power of a corporation to authorize and issue additional capital stock and to sell it. There certain shares of stock and certain bonds were sold together as a unit for fair value. There is no resemblance between that case and the situation claimed here, to wit, that in consideration for a loan to a corporation its stockholders gave to the lender *their* stock and thus gave it ownership of the corporation.

The power to "protect, preserve or improve collateral" was first added to the Merchant Marine Act of 1936 by amendment to Section 207, on June 23, 1938. On the same day Congress enacted Section 215 (46 U.S.C. Sec. 1125) which authorized the Commission in certain circumstances to acquire ships by purchase or otherwise. It also then amended Section 202 (46 U.S.C. Sec. 1112) to give the Commission the power to extend and renew notes. Section 215 and the amendments to Sections 207 and 202 are to be read together. Each had for its purpose the enlargement of the Commission's authority in respect to the performance of specific duties and the exercise of specific powers.

Prior to June 23, 1938 the Commission was without authority to acquire ships. *A fortiori,* it had no power to acquire them indirectly by acquiring the stock of a steamship line. Prior to that date even its power to acquire stock as collateral was questioned. What the Commission then obtained was (a) the authority to acquire ships but not corporate stock; (b) the authority to extend indebtedness, and (c) the power to protect and preserve collateral. *Expressio unius est exclusio alterius.*

In 18 *Decisions of the Comptroller General* 262, the Comptroller General held that Section 207, as amended to confer the power to protect, preserve or improve collateral

> "evidently was not deemed by the Congress as sufficiently broad to vest in the Commission a general power to purchase vessels, even for its own account.
>
> "Had such been the purpose of the amendment it would have been unnecessary and frivolous for the Congress to add just below the entirely new section 215 * * *."

It is equally frivolous to assert that the amendment to Section 207 was sufficiently broad to vest in the Commission the power to acquire a steamship company.

On the contrary, the 1938 amendment, in conferring the power to make disbursements and contracts "to protect, preserve or improve the collateral held by the Commission to secure indebtedness" is overwhelming proof that the Act did not, either there-

tofore or thereafter, confer the greater power to acquire outright ownership of property. Of course, the power to "protect, preserve or improve collateral" does carry the power to foreclose on the collateral, and in any such foreclosure sale to bid it in if there are no other bidders willing to bid a sufficient amount to pay the debt. This is but exercise of the powers conferred by the mortgage contract.

But here the security prior to the transaction of August 1938 was ships, not stock. And there was no attempt to sell the security (the ships) on foreclosure.

Appellant (R. Br. 10) argues that the trial court in *Dollar v. Land* held that acquisition of outright title was authorized by the Commission's power to protect and preserve the collateral. The Court of Appeals made short shrift of that wholly untenable argument (see passage quoted at p. 24, supra, and see our brief, p. 99).*

Appellant (R. Br. 13) refers to a report of a House Committee on the 1938 amendment to Section 207, in which it is said that the amendment was designed to make clear a power which it was thought already existed but about which some doubt has been expressed. The power already thought to exist was the power to take security and spend money to preserve security, e.g., to protect ships under mortgage from deterioration. The House Report stated:

*The trial court in *Dollar v. Land* apparently believed that if the Commission could buy in the mortgaged ships on foreclosure, it could acquire any property any time in any transaction. A power to buy in mortgaged property at a foreclosure in event of default cannot imply power to buy any property at any time and whether it has been mortgaged or not. A foreclosure sale is public, others may bid, the foreclosure and sale must be conducted according to statutory provisions, and the mortgagor is protected by various principles of equity and by rules against stifling of bidding. Foreclosure and sale of ships would be controlled by Section 250, Ship Mortgage Act, 46 U.S.C. Sec. 951. If other bidders offer enough to discharge the debt, a mortgagee could not draw power to buy out of power to protect its collateral, for a purchase would then be alien to protection. Moreover, proceeds of a foreclosure sale are used to discharge the debt which the foreclosed security protects. Here the $7,500,000 debt secured by the ships was not reduced one penny.

"Section 3. This amends Section 207 of the Merchant Marine Act, 1936. * * * The specific reference to the power of protecting and preserving the collateral mortgages, and so forth, held by the Commission is intended to make certain that the Commission possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies, such as the Reconstruction Finance Corporation. Without such authority, the Commission may find it impossible to protect its mortgage or other interest in vessels, and title to which is in a transitory state, or where vessels are operated by the companies which are financially embarrassed when such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation."

The Hearings before the Committee on Commerce and the Committee on Education and Labor, United States Senate, 75th Congress, Third Session, on S. 3078 (the same bill), February 16 and 17, 1938, at pages 1157 and 1158, show the scope and purpose of the amendment to Section 207 beyond any question.* Mr. Kennedy, Chairman of the Commission, and Mr. Truitt, then its General Counsel, testified that their purpose was to have the power to spend money to protect the ships on which they had mortgages. There was no suggestion of taking title without a mortgage foreclosure, and none to acquiring ownership of a steamship company.

2. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP CAN BE DERIVED FROM ANY SUPPOSED POWER OF THE OLD SHIPPING BOARD OR FROM ITS FREEDOM FROM CONTROL OF THE GENERAL ACOUNTING OFFICE (R. Br. 10-15).

We answered this in our brief, pp. 115-119.

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*One of the Judges of the District of Columbia Court of Appeals, the Honorable Bennett C. Clark, was at the time a Senator, a member of the Committee, and was present at the hearings.

3. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP CAN BE PREDICATED ON ALLEGED POSSESSION BY THE COMMISSION OF THE POWERS OF A PRIVATE CORPORATION (R. Br. 15-21).

In our brief (pp. 110, 111) we answered this argument.

Appellant's reply brief (p. 15) refers to *Standard Oil Co. of California v. United States,* 59 F. Supp. 100.* That was a libel in admiralty for damages to cargo shipped on a vessel owned and operated by the United States through the W.S.A. The right to bring the suit was expressly provided by the Suits in Admiralty Act (46 U.S.C. Secs. 741-52). On the merits, one of the issues was whether the Administrator had the power, in executing a charter party, to create liabilities against the United States for all provable damages, including attorney's fees. The power to execute the charter did not depend on extracting from Section 207 of the Merchant Marine Act the power to do whatever a private corporation can do. Section 704 of the Act (46 U.S.C. Sec. 1194) provided in express terms that "all vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act."

The power to enter into a charter being *expressly granted* elsewhere in the statute, that power could be exercised *in the manner* of a private corporation under Section 207. The Administrator could put into the charter such clauses as were common in charters made in private business.

The case, far from supporting appellant, does the reverse. It aptly illustrates the proper limits of the provision in Section 207 relative to private corporations. *If* an express power to do an act *can elsewhere be found,* that power may be exercised in the *manner* of a corporation. But the provision as to corporations does not itself create a power not otherwise expressly conferred. If it did, the rest of the Merchant Marine Act would be futile and unnecessary, and many pages of enactment and many statu-

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*The decision was affirmed by this Court, *United States v. Standard Oil Company,* 156 F.2d 312, but no reference to the alleged possession by the Commission of the powers of a private corporation is made.

tory amendments in the 13 years since 1936 would have been a useless waste of good paper.*

4. RE THE CLAIM THAT THE POWER TO ACQUIRE OWNERSHIP CAN BE IMPLIED FROM THE COMMISSION'S FUNCTIONS AS A GOVERNMENT AGENCY.

Finally, appellant (R. Br. 21-24) argues that the power is to be implied without reference to "powers of a corporation" or any of the matters already discussed.

The argument is grandly vague, sublimely indifferent to any foundation in concrete legislation.

The simple truth is that a power cannot be implied from a vague assemblage of supposed purposes. An implied power can only be derived from express powers, and the implication must be *"necessary"*.†

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*Appellant (R. Br. 16) refers to the power of the Reconstruction Finance Corporation to accept securities in discharge of debts. But the R.F.C. *is* a corporation and the debts are its own. Note what the Supreme Court said about such corporations in *United States ex rel. Skinner & Eddy Corporation v. McCarl,* 275 U.S. 1, discussed in our brief, p. 116.

†The cases cited by appellant as supporting implied powers do not help it here. In *Burns v. United States,* 160 Fed. 631 (2 Cir.) the power to buy land for a sea wall was derived from an express power to build a sea wall together with an express appropriation for the purpose. In *United States v. Threlkeld,* 72 F.2d 464, the power to acquire land for roads was derived from an express power to construct roads and improvements coupled with an express appropriation for the purpose. The limit of these cases is shown by *Chase v. United States,* 155 U.S. 489, which held that the power either to lease or to buy premises for a post office could not be implied from the power of the Postmaster General to "establish post offices" there being no appropriation to purchase or lease. The court held that the power must come "from a statute which either expressly or by *necessary* implication authorizes him to make such lease or purchase." Moreover, it pointed out that the power to establish post offices must be read in conjunction with the co-existent general statute, Title 41 U.S.C., Sec. 11, which prohibits acquisition of property by government agents without authority of statute.

And in the *Teapot Dome* case (*Pan American Petroleum & Transport Company v. United States,* 273 U.S. 456, at 502) the court held that a power to exchange government oil for storage facilities could not be implied "in the absence of language clearly requiring it." Appellant would distinguish that case (R. Br. 24) on the ground that a lease of government

And so, we ask, to what express power does appellant point to as the source of its alleged implied power? After distillation of the discussion, the residue is the *mere* fact that collection of the debt was entrusted by law to the Commission—no more. *But a power to compromise cannot be implied merely from the power to administer and collect the debt.* We so showed in our brief, pp. 104-107. We find no answer to that discussion. We showed also that a corporate agent for collection of debts has no more authority to compromise those debts than an agent who is a natural person. Appellant (R. Br. 13) asserts that the Commission had power to compromise "debts owed it". But, as we showed in our brief (pp. 111, 112), the debts involved in this case were not "owed it"; they were debts to the United States.

Appellant says that powers reasonably incident to the performance of statutory functions may be implied. What functions here? The Merchant Marine Act of 1936 did not state that the Commission had a broad objective and let it go at that. It declared a policy—and that policy was to further a merchant marine under private ownership (Sec. 101; 46 *U.S.C.* Sec. 1101; Sec. 210, 46 *U.S.C.,* Sec. 1120). Then, having declared its policy, Congress proceeded in the Act to specify the administrative functions of the Commission and the authority and the responsibilities which it deemed proper to further the policy which it declared. It did not leave to the Commission the manufacture of such powers as the Commission thought would be desirable in furtherance of that policy. Congress has itself decided what activities should be permitted in order to achieve its ends.

Appellant recognizes that Congress gave a whole series of express and limited grants of power to the Commission to compromise debts, dispose of government property, and to acquire property, all in specific circumstances. It denies that this fact clearly negatives the general all-embracing implied power for which it contends. Its argument compels it to contend that the

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property was held to be invalid because procured by fraud and corruption. But that was another issue. It also held that an exchange of oil for storage facilities was invalid for lack of power.

implied power upon which it insists was broader than any of the express powers and comprehended them all, and that the express provisions were not *grants* of power but merely limitations of a broad and unconfined power existing by implication only! In short, the numerous express grants merely subtracted segments from the broad but implied grant! During World War II and the previous and subsequent period of national emergency the Commission frequently came to Congress requesting and obtaining legislation relative to its powers. Yet, according to appellant, the Commission, instead of asking for broader power, was in fact begging for limitations and restrictions on power already possessed!*

Moreover, a power cannot be implied against an express restriction. And we have shown a number of such restrictions.

We showed that whenever Congress desired to empower the Maritime Commission to dispose of government property it said so expressly. Appellant concedes that this is so, but argues (R. Br. 30) that "discharging a liability by compromise is no more a disposition of Federal property, i.e., the chose in action, than would be a discharge by * * * payment in full." The contention is patently unsound, for by receipt of payment in full the payee receives all to which it is legally entitled and gives up nothing. If the argument were sound, any public official charged with

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*In the hearings before the Senate Committee on Commerce, 77th Congress, First Session, on S.J. 67 and H.R. 4466, May 1, 7, 8 and 12, 1941, to authorize the Commission to purchase domestic and foreign vessels for national defense, the following passages may be found:

> "Senator Clark. Senator, did you ever hear of any representative of the administrative branches of the government placing any limitation on the widest possible grant of blank-check powers?" (p. 136)
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>
> "Admiral Land [Chairman of the Maritime Commission]. Mr. Chairman and members of the Committee * * * the Maritime Commission would very much like the law as elastic as practicable, without restrictions, and without any strings to it whatsoever, in order to safeguard the national defense" (pp. 8, 9)
>
> *   *   *   *   *   *   *
>
> "Admiral Land. No; because the Maritime Commission has asked for wide open legislation, with no strings on it whatsoever." (p. 11)

collecting a debt could accept in satisfaction any substitute performance he saw fit.

Appellant then argues that Congress often spells out expressly what would be implied anyway, citing *United States v. Cors,* 337 U.S. 325, and *Mason v. United States,* 260 U.S. 545. But Mason's case merely applied the "rule that an affirmative statute, without a negative express or implied, does not take away from the common law," and *Cors'* case noted that an affirmative statute might do no more than state for a particular set of facts what was already required generally by the Constitution. In each case there was a pre-existing rule, *not* based on or derived from an expression of Congressional will. But common sense tells us that the situation is different when the rule or power must find its source in an expression of Congressional will, and the very statute from which it is sought to imply such a power covers the field by a series of limited grants. *Lewis' Sutherland on Statutory Construction* (2d ed.), Sec. 491, p. 916. The rule in such a case is that stated in *Texas & Pacific Railway Co. v. Pottorff,* 291 U.S. 245, 253: "powers not conferred by Congress are denied."

Appellant asserts in another context that Title 46 U.S.C., Sec. 1116, which requires all "proceeds of all debts" transferred to the Maritime Commission from the Shipping Board to be placed in the United States Treasury, relates only to money (R. Br. 56). It follows that Congress has *affirmatively* required that the debts entrusted to the Commission to handle must be collected in money only. Appellant hastens to argue (R. Br. 28) "So to construe it [i.e., Section 1116] would create a conflict with 46 U.S.C. 1114, which gave the Commission 'All the functions, powers and duties of the Shipping Board with respects to the ship debts'." But, as we have seen, the Shipping *Board* had no power to compromise debts due the United States. Again, by the 1938 amendments to Section 202 of the Merchant Marine Act of 1936 Congress expressly conferred on the Commission the power to extend and renew debts. Appellant argues that this express grant was necessary because of a previous express limitation on the powers of the

Commission as successor to the Shipping Board. That limitation, it says, is the provision in Section 5 of the Merchant Marine Act of 1920 (41 Stat. 990, 46 U.S.C. 864) that in selling ships the Board was free to insert in the contract of sale such terms as it thought proper but could not defer payment beyond 15 years. Yet this very provision required sales of ships to be *for money* only. It was under this statute and by virtue of a sale of ships that the debts of Mr. Dollar and Dollar of California to the United States had arisen. If the statute required sale for money only, how could the Shipping Board's successor accept something other than money? If this statute was such an express prohibition of a power to extend credit beyond 15 years as to require a specific enactment in 1938 to permit extension, why was it not also such an express prohibition against accepting anything other than money as to require an express statute to permit the acceptance of stock?

Whenever confronted by a concrete objection, appellant abandons its reliance on vague implications from broad functions and falls back on the contention that the Commission had the powers of a corporation. It repeatedly does so at pages 24-34. Every other argument collapses with its concession at pages 24 and 28 that the regular departments of the government have no such power as it here claims. In trying to give the Maritime Commission a greater power, it rests on the assumption that the Commission had the powers of a private corporation. That assumption is both false and irrelevant.

5. THE TRANSACTION COULD NOT BE CALLED A COMPROMISE.

In our brief (pp. 119-122) we showed that there can be no compromise, *as a matter of law,* unless (a) there is a dispute as to liability or (b) a doubt of collectibility, and that there was never any dispute as to liability of Mr. Dollar or Dollar of California nor any doubt of collectibility from them.

Appellant neither denies the legal rule nor asserts the existence of any dispute as to liability or doubt of collectibility. Instead, it

indulges in argument (Rr. Br. 32-34) to attribute motives to the transferors of the stock for wanting to enter into the transaction. The argument is this: Because the Commission had the power to force a wanton sacrifice of the mortgaged ships at a grossly inadequate price, Mr. Dollar and Dollar of California were persuaded to part with their stock to avoid being called on to pay the notes, and the other transferors, who were not indebted to the United States, were persuaded to do so to protect their investment in preferred stock.

Many things could be said about the facts and law implied in this argument. But taking it at face value, *it still wholly fails to describe a "compromise"*. It simply describes an exchange of property for personal liability. The parties have disputed whether that exchange resulted in an outright transfer of ownership or a substitution of security. But whether the one or the other, it could *not* be a compromise. And so the power to make it cannot be predicated on an alleged power to compromise (see Our Brief, pp. 121, 122).*

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*Appellant's argument is unsound in any event. Appellant contends that the possible out-of-pocket with which Mr. Dollar and Dollar of California were confronted was not merely a possible deficiency after mortgage foreclosure on the ships, but the whole amount of their notes. While it is true that they could have been sued on the notes without prior foreclosure (46 U.S.C. Secs. 911, et seq.), they would be subrogated to the rights of the United States not merely against Dollar of Delaware personally but in the mortgage security as well. *Prairie State Bank v. United States,* 164 U.S. 227, 232; *Maryland Casualty Co. v. United States,* 53 F. Supp. 436 (Ct. Cl.). They could have compelled Dollar of Delaware to "exonerate" them, to pay before they were compelled to do so (Restatement of Security, Sec. 112; *Wendlandt v. Sohre,* 33 N.W. 700, 37 Minn. 162), and all questions of liability among all parties would have been adjustable in one proceeding. If Mr. Dollar and Dollar of California were sued jointly, Dollar of Delaware would have had to be joined as a defendant. *Minor v. Mechanics Bank,* 1 Pet. 46, 73; 47 C.J. 69, Sec. 145. If either was sued alone, he or it could have immediately impleaded Dollar of Delaware under Admiralty Rule 56. The suit would have been in admiralty, since the jurisdiction of admiralty was exclusive. *Detroit Trust Company v. The Thomas Barlum,* 293 U.S. 21, 42. The decree of the court in the one suit, resulting in foreclosure of the mortgage, would require application of the proceeds on any judgment against Dollar of California and Mr. Dollar.

Whatever motives appellant seeks to attribute *to the transferors,* no foundation existed on which *the creditor, the government,* could predicate a compromise.

It may be noted that as part of the transaction another \$4,500,000 was lent to the steamship line. It would be frivolous to say that the Commission had any doubt of collectibility of the \$7,500,000 when it increased the debt to \$12,000,000. It received nothing that could not already have been subjected to execution to pay a judgment on the debt.

Moreover, appellant's brief states that the Commission's purpose was to acquire ownership in order to deprive the equity holders of any chance of profit from success. That contention at once shows that the argument about compromise is spurious.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

Dated: San Francisco, April 2, 1952.

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Moreover, the mortgages provided that the mortgagee could take possession of the ships, without court procedure, and sell them, with power of attorney to convey in the name of the mortgagor (J.A. 307, 308), and this right would also have passed to the co-obligors. *Prairie State Bank v. United States,* 164 U.S. 227, 232.

Appellant's argument that the other transferors were trying to protect investments in preferred stock ignores the fact that the preferred stock was never imperilled. In consummating the transaction in October 1938 the Commission acted on reports of Commissioner Truitt (J.A. 1264-5) that the mortgaged ships had a value substantially in excess not only of the total debt but of the proposed new debt of \$4,500,000 as well. Since the proposed new debt was ⅓ greater than the amount of the preferred stock (\$3,359,300 par (J.A. 1293)), the ships were worth more than enough to care for the old debt plus the preferred stock.